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THE SUPREME COURT AND THE INSULAR CASES.

The decisions in the Insular cases mark the most extraordinary division of opinion in the history of the Supreme Court. In the two most important cases—*De Lima vs. Bidwell*, and *Downes vs. Bidwell*—the conclusions of the court were announced by Mr. Justice Brown. In the former he was supported by The Chief Justice, and Justices Harlan, Brewer and Peckham ; in the latter his concurring associates were Justices White, Shiras, McKenna and Gray ; The Chief Justice and Justices Harlan, Brewer and Peckham dissenting. To add to the complexity of the situation the conclusions reached by Mr. Justice Brown in the Downes case are supported by a totally different course of reasoning by the concurring Justices. In fact, in the concurring opinion of Justices White, Shiras and McKenna it is distinctly stated that while concurring in the decree affirming the judgment in the Downes case, the grounds upon which the judgment is based are “different from, if not in conflict with those” expressed in Mr. Justice Brown’s opinion.

The series of opinions brings up in acute form the question of the desirability of elaborate dissenting opinions. If certainty is the highest desideratum of law, there can be no doubt that the criticism by the minority, of principles laid down by the majority of the members of the court, hardly conduces to this end. It furthermore tends to reduce the dignity of the decisions of the tribunal, and to that extent diminishes their authority. In the income tax cases this danger first became clearly apparent, but it is greatly increased in the Insular cases, owing to the fact that the majority of the court is divided four to one in the reasoning supporting their conclusions.

The decisions have served to bring out with great clearness the peculiar position occupied by the Supreme Court. Unlike any other tribunal, it is at times called upon to pass on

questions which, while legal in form, are political in substance, profoundly affecting the fabric of our institutions. Dissenting opinions on such questions are usually characterized by a tone of criticism which is not calculated to foster respect for the Constitution nor to increase the stability of our institutions. It is true that "government by discussion" might suffer by the failure to present both sides of every important question, and it is likely that most of the objections to the present form of dissenting opinion would disappear if the dissenting Justices would confine themselves to the more positive exposition of their views rather than attempt a destructive rebuttal of the reasoning of the majority.

The court distinguishes three periods in the status of Porto Rico. The first is embraced between the date of military occupation and the ratification of the treaty of peace, during which time the Island remained foreign territory so far as the revenue laws are concerned, and customs duties could therefore be imposed under the war power. The second period begins with the ratification of the treaty and closes with the passage of the Foraker Act. In the opinion of the court the effect of such ratification was to make Porto Rico domestic territory, and to take it out of the class of "*foreign countries*," within the meaning of the Dingley Revenue Act. The collection of customs duties on Porto Rican products during this second period is therefore declared to have been illegal. These two questions were decided in the De Lima and Dooley cases.

The third period begins with the establishment of civil government, and was the subject of consideration in the Downes case. The court here makes a distinction between "those prohibitions of the Constitution such as go to the very root of the power of Congress, to act at all, irrespective of time or place, and such as are operative only" *throughout the United States* or among the several states. Porto Rico, it is held, while belonging to the United States, is not a part

of the United States within the meaning of the Constitution. The court clearly intimates that the power of Congress with respect to the territories is not absolute. All those provisions which specifically restrict the competency of Congress are quite as applicable in the territories as in the states. "Thus, when the Constitution declares that no bill of attainder or *ex post facto* law shall be passed, it goes to the competency of Congress to pass a bill of that description." This would seem to make the bill of rights contained in the first eight amendments applicable to Porto Rico. In order to avoid the appearance of passing definitely upon this point the court says: "We do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight amendments is of general, and how far of local application."

To appreciate the full import of the decisions and the radically divergent views presented in the majority and minority opinions, it is necessary to make a brief analysis of each. The three cases—*Dooley vs. United States*, *De Lima vs. Bidwell* and *Downes vs. Bidwell*—present in logical order the questions examined by the court.

The case of *Dooley vs. United States* was the first involving the validity of duties collected prior to the ratification of the treaty of Paris. It also involved duties collected subsequent to such ratification, but as this question is more fully discussed in the *De Lima* and *Downes* cases, it is only necessary to examine the *Dooley* case with reference to the one question, namely, the validity of customs duties collected prior to the eleventh of April, 1899. On this point, and on this point alone, the court is unanimous. The exaction of customs duties during this period is justified as an exercise of the war power. "Upon the occupation of the country by the military forces of the United States the authority of the Spanish government was superseded, but the need for a revenue did not cease. The government must be carried on, and there was no one left to administer

its functions but the military forces of the United States. Money is requisite for that purpose, and money could only be raised by order of the military commander. The most natural method was by the continuation of existing duties."

The validity of duties collected subsequent to the ratification of the treaty of Paris, but prior to the establishment of civil government, was involved in the *De Lima* case. Mr. Justice Brown delivered the opinion of the court; The Chief Justice, Justices Harlan, Brewer and Peckham concurring. Two dissenting opinions were filed, one by Mr. Justice McKenna (Justices Shiras and White concurring), the other by Mr. Justice Gray.

In comparing the majority and minority opinions the most striking difference is in the relative importance given to the factor of "expediency." The majority opinion adopts certain hard and fast rules of interpretation, and shows an evident disinclination to give any weight to the inconvenience which might result to the political organs of the government because of such interpretation. The minority opinion, on the other hand, contains a broad treatment of the relation between the different departments of the government, and it is easy to detect a settled determination to leave to Congress and the Executive a free hand in dealing with our new possessions. The minority seems to be impressed with the fact that the power and influence of the Supreme Court of the United States has been largely maintained through well settled traditions of judicial self-control, which has led the court, whenever possible, to avoid placing obstacles in the way of the political organs of the government when dealing with great questions of public policy.

To the majority, the question to be decided turns upon the meaning of the word "foreign," *i. e.*, whether Porto Rico after the ratification of the treaty of Paris remained "foreign territory" within the meaning of the tariff laws. To the minority, it is one of public policy as well, to be viewed broadly with reference to the altered circumstances

in the development of the country and also with a view to the probable effect upon the power of Congress and the Executive, if the rules as formulated by the majority prevail.

Whether Porto Rico is a "foreign country" within the meaning of the tariff laws presents itself as an extremely simple one to the majority of the court. The definition of Mr. Chief Justice Marshall: "A foreign country is one exclusively within the sovereignty of a foreign nation, and without the sovereignty of the United States"¹ is accepted as conclusive.

The first difficulty which the court meets in attempting to reconcile this conclusion with the established precedents is the case of *Fleming vs. Page*,² which was an action to recover duties on merchandise imported from Tampico (Mexico) during the occupation of that port by the troops of the United States. In that case the court laid down the rule that until Congress brought such port within the customs lines, by establishing a collection district, Tampico remained a foreign port so far as revenue laws of the United States are concerned. The majority of the court in the De Lima case, while accepting the conclusions of *Fleming vs. Page*, qualify its application by regarding *as dictum* that portion of the opinion which relates to the establishment of collection districts.

The case upon which the court chiefly relies is *Cross vs. Harrison*,³ which involved the validity of duties paid at the port of San Francisco upon merchandise imported from foreign countries into California between February 2, 1849, —the date of the treaty of peace between the United States and Mexico, and November 13, 1849, when the collector appointed by the President under an act of Congress passed March 3, 1849, entered upon his duties. In this case the

¹ The Boat "Eliza," 2 Gall. 4.

² 9 Howard 603.

³ 16 Howard 164.

court held that "after the ratification of the treaty, California became a part of the United States, or a ceded, conquered territory" and that "*as there is nothing differently stipulated in the treaty with respect to commerce,*¹ it became instantly bound and privileged by the laws which Congress had passed to raise a revenue from duties on imports and tonnage." The italicised clause is important as it enables the dissenting justices to invoke the same opinion in support of their view.

But, even in the absence of all precedent, the conclusions of the court would remain unchanged: "Were this presented as an original question, we would be impelled irresistibly to the same conclusion." Under the Constitution, treaties and laws of the United States are of equal force and effect. One of the ordinary incidents of a treaty is the cession of territory, and it follows from this "that by the ratification of the treaty of Paris the Island became territory of the United States,—although not an organized territory in the technical sense of the word." The theory that "a country remains foreign with respect to the tariff laws until Congress has acted by embracing it within the customs union presupposes that a country may be domestic for one purpose and foreign for another." The conclusion of the court is therefore that "at the time these duties were levied, Porto Rico was not a foreign country within the meaning of the tariff laws but a territory of the United States, that the duties were illegally exacted and that the plaintiffs are entitled to recover them back."

It is important to note that the military government was in operation more than a year after the ratification of the treaty of Paris. Under the decision in the De Lima case, however, all duties collected after the ratification of the treaty, whether under military or civil rule, are invalid. While the military arm might continue to govern the Island, the ratification of the treaty of cession made it domestic

¹ The italics are not in the original.

territory, and the power to exact further customs duties therefore ceased. This principle is laid down in *Dooley vs. United States* and reasserted in the *De Lima* case.

Between the majority and minority in the *De Lima* case, there exists an irreconcilable difference of opinion as to the meaning of the words "foreign country" as used in the revenue laws. The minority unqualifiedly accepts the interpretation of *Fleming vs. Page*. "We submit" says Mr. Justice McKenna "that the principle upon which *Fleming vs. Page* was based is still a proper principle for judicial application. Does it not make government provident, not haphazard, ignoring circumstances and producing good or ill accidentally? Does it not leave to the Executive and the Legislative Departments that which pertains to them? Did it not stand as a guide to the Executive—a warrant of action, so far as action might affect private rights? Indeed, what is of greater concern—so far as action might affect great public interests? It should, we submit, be accepted as a precedent. It is wise in practice; considerate of what government must regard, and of the different functions of the Executive, Legislative and Judicial departments and of their independence. Why should it then be discarded as *dictum*? If constancy of judicial decision is necessary to regulate the relations and property rights of individuals, is not constancy of decision the more necessary when it may influence or has influenced the action of a nation? If the other departments of the government must look to the judicial for light, that light should burn steadily. It should not, like the exhalations of a marsh, shine to mislead."

In the interpretation of *Cross vs. Harrison* the minority is no nearer the majority than in regard to *Fleming vs. Page*. Extracts from the opinion are quoted to show that no automatic application was given to the tariff laws in that case, but that their extension was made dependent upon the action of the President. To remove any further doubt the difference between the treaty with Mexico and the treaty with Spain

is pointed out. The former provided specifically for the incorporation of the ceded territory into the United States; whereas the latter expressly declares that the status of the ceded territory is to be determined by Congress.

Finally, the views of the majority as to the effect of treaties of cession upon our domestic institutions, are examined. If by such treaties, all newly acquired territory must be regarded as domestic, and all the laws of the United States automatically applicable thereto, consequences of the gravest nature may result, particularly to the revenue system. "Its entire plan may be impaired or be destroyed by change in any part. The revenues of the government may be lessened, even taken away by change; the industrial policy of the country may be destroyed by change. We are repelled by the argument which leads to such consequences, whether regarding our own country or the foreign country made 'domestic.' If 'domestic' as to what comes from it, it is 'domestic' as to what goes to it, and its customs laws as well as our customs laws may be cast into confusion, and its business and affairs deranged before there is possibility of action. Under the theory of automatic and immediate incorporation neither we nor the conquered nation would have any choice in the new situation,—could make no recommendation to exigency, would stand bound in a hopeless fatality. Whatever be the interests, temporary or permanent, whatever might be the condition or fitness of the ceded territory, the effect on it or on us, the territory would become a part of the United States with all that implies."

In the opinion of the minority Porto Rico occupies a relation to the United States, "between that of being a foreign country absolutely, and of being domestic territory absolutely." Such a view "vindicates the government from national and international weakness. It exhibits the Constitution as a charter of great and vital authorities, with limitations indeed, but with such limitations as serve

and assist government, not destroy it; which, though fully enforced, yet enable the United States to have—what it was intended to have ‘an equal station among the Powers of the earth,’ and to do all ‘Acts and Things which Independent States may of right do.’ ”

Mr. Justice Gray in a separate dissenting opinion points out that the majority opinion is irreconcilable with the unanimous opinion of the court in *Fleming vs. Page*, and with the opinions of the majority in *Downes vs. Bidwell*.

The De Lima case only settled the question of the applicability of the tariff laws of the United States during the period between the ratification of the treaty of Paris (April 11, 1899) and the establishment of civil government (May 1, 1900). The Downes case which was made the subject of the most exhaustive analysis, by both the majority and the minority, involved the question of the validity of customs duties collected subsequent to the establishment of civil government.

In the De Lima case the court was only called upon to decide whether Porto Rico was a “foreign country” within the meaning of the tariff laws. For the decision of this question it was not absolutely necessary to discuss the applicability of constitutional provisions to the territories. The only question to be passed upon was whether the ratification of the treaty had taken Porto Rico out of the category of “foreign countries” within the meaning of the enacting clause of the Dingley Tariff Act, which reads: “There shall be levied, collected and paid upon all articles imported from foreign countries,” etc. As was contended by the minority, the word “foreign” as used in that Act must be examined with reference to the intent of Congress in framing the tariff laws, and, that to hold that Porto Rico was not “foreign” in the same sense that Germany or France is “foreign” does not answer the question at issue.

It is true that the court in the De Lima case took up the question of the applicability of the Constitution to the ter-

ritories, but it did not give the subject the exhaustive treatment which we find in the *Downes* case. In the *De Lima* case the court held "that upon the ratification of the treaty of peace with Spain, Porto Rico ceased to be a foreign country, and became a territory of the United States, and that duties were not legally collectible upon merchandise brought from that Island." In the *Downes* case the court was called upon to determine whether Porto Rico became a part of the United States within that provision of the Constitution which declares "that all duties, imposts and excises shall be uniform throughout the United States." The judgment of the court, answering this question in the negative is concurred in by Justices Brown, White, Shiras, McKenna and Gray. But while the majority of the court is agreed as to the validity of duties collected on goods coming from Porto Rico, subsequent to the act establishing a civil government, there is, as has already been pointed out, a marked divergence in the reasoning supporting this conclusion. We have, in fact, three opinions to deal with. One by Mr. Justice Brown, in which he announces the conclusions of the court, another by Mr. Justice White, concurred in by Justices Shiras, McKenna and Gray, and a dissenting opinion by The Chief Justice, concurred in by Justices Harlan, Brewer and Peckham. In the judgment, therefore, the court is divided five to four, but if we disassociate the judgment from the supporting opinions we find a different grouping,—Mr. Justice Brown stands alone, the other eight Justices being equally divided.

In an analysis of the opinions it is evident that the opinion written by Mr. Justice White deserves first place inasmuch as it has the support of three of his colleagues,—Justices Shiras, McKenna and Gray. The leading premise in the reasoning of Mr. Justice White is that Congress, in governing the territories, is subject to the Constitution; in other words, that "every provision of the Constitution which is applicable to the territories is also controlling therein."

After a considerable preliminary discussion, Mr. Justice White formulates the real question at issue: "Had Porto Rico, at the time of the passage of the act in question (Foraker Act), been incorporated into and become an integral part of the United States?" In answer thereto the court invokes the principles laid down in *American Insurance Co. vs. Canter*, that "if conquered territory be ceded by treaty, the acquisition is confirmed, and the ceded territory becomes a part of the union to which it is annexed, either on the terms stipulated in the treaty of cession or on such as its new master shall impose." As Mr. Justice White cogently says, "to concede to the government of the United States the right to acquire, and to strip it of all power to protect the birthright of its own citizens and to provide for the well-being of the acquired territory by such enactments as may in view of its condition be essential, is, in effect, to say that the United States is helpless in the family of nations, and does not possess that authority which has at all times been treated as an incident of the right to acquire."

If the treaty-making power has the right to effect the absolute incorporation of new territory into the United States, the representative organ of the government,—the House of Representatives,—would be stripped of its most important powers. "Although the House of Representatives might be unwilling to agree to the incorporation of alien races, it would be impotent to prevent its accomplishment, and the express provisions conferring upon Congress the power to regulate commerce, the right to raise revenue—bills for which, by the Constitution, must originate in the House of Representatives—and the authority to prescribe uniform naturalization laws, would be in effect set at naught by the treaty-making power."

In the view of Mr. Justice White, the United States at the adoption of the Constitution consisted not only of States but also of territories, but that subsequently acquired territory whether by purchase or by treaty could not be incor-

porated into the United States, except by the express or implied assent of Congress. "It is then, as I think," says Mr. Justice White, "indubitably settled by the principles of the law of nations, by the nature of the government created under the Constitution, by the express and implied powers conferred upon that government by the Constitution, by the mode in which those powers have been executed, from the beginning, and by an unbroken line of decisions of this court, first announced by Marshall and followed and lucidly expounded by Taney, that the treaty-making power cannot incorporate territory into the United States without the express or implied assent of Congress, that it may insert in a treaty, conditions against immediate incorporation, and that on the other hand when it has expressed in the treaty the conditions favorable to incorporation, they will, if the treaty be not repudiated by Congress, have the force of the law of the land, and therefore by the fulfillment of such conditions cause incorporation to result. It must follow, therefore, that where a treaty contains no conditions for incorporation, and, above all, where it not only has no such conditions but expressly provides to the contrary, that incorporation does not arise until, in the wisdom of Congress, it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family."

While, therefore, at the time these duties were collected (November, 1900) Porto Rico was not a foreign country in an international sense, "since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the Island had not been incorporated into the United States, but was merely appurtenant thereto as a possession. As a necessary consequence, the impost in question assessed on merchandise coming from Porto Rico into the United States after the cession, was within the power of Congress, and that body was not, moreover, as to such imposts, controlled

by the clause requiring that imposts should be uniform throughout the United States."

In the opinion written by Mr. Justice Brown there is an evident intention to prove that the territories have never been considered a part of the United States within the meaning of the Constitution. He deduces this from the character of the Articles of Confederation, the wording of the Constitution, and the nature of the territorial government established in the Northwest territory. The practice of the government in dealing with the territories during the present century is examined with considerable detail, with a view to showing that Congress has recognized the fact "that provisions intended for the States did not embrace the territories unless especially mentioned." Mr. Justice Brown then proceeds to examine the precedents established by the Supreme Court and admits, at the outset, that the decisions of the court upon this subject have not been altogether harmonious. Before examining these cases he is careful to lay down the rule established in *Cohens vs. Virginia*, (6 Wheaton 264, 399) that "it is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the decision in a subsequent suit when the very point is presented for decision."

Having reached the conclusion that the territories are not to be considered parts of the United States within the meaning of the Constitution, Mr. Justice Brown proceeds to establish a distinction between such prohibitions as are operative only throughout the United States or among the several States, and such as go to the very root of the power of Congress to act at all, irrespective of time or place. "When the Constitution declares that no bill of attainder or *ex post facto* law shall be passed, and that no title of nobility shall be granted by the United States, it goes to the competency of Congress to pass a bill of that description." On the other

hand when the Constitution simply states that a certain rule shall be established throughout the United States, such as that relating to the uniformity of duties, imposts and excises, it only becomes necessary to inquire whether there be any territory over which Congress has jurisdiction, which is not a part of the United States, "by which term we understand the *States* whose people *united* to form the Constitution, and such as have since been admitted to the Union upon an equality with them." The fact that there may be such territory is proven to the satisfaction of Mr. Justice Brown by the wording of the Thirteenth Amendment which recognizes a distinction between the United States and "any place subject to their jurisdiction."

In order to quiet any apprehension as to the danger of placing the inhabitants of a territory at the complete mercy of Congress, Mr. Justice Brown endeavors to strengthen the distinction between the two classes of Constitutional provisions above referred to, by resurrecting the "natural rights theory" so dear to one of his former colleagues—Justice Field. "We suggest, without intending to decide, that there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what would be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinion, and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice; to due process of law and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, to suffrage, and to the particular methods of procedure pointed out in the Con-

stitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the States to be unnecessary to the proper protection of individuals."

The conclusion reached by Mr. Justice Brown is that the right of the national government to acquire foreign territory once established; the presumption arises that its power with respect to such territories is the same as other nations have been accustomed to exercise with respect to territory acquired by them, or as he forcibly puts it: "Choice in some cases, the natural gravitation of small bodies to large ones in others, the result of a successful war in still others, may bring about conditions which would render the annexation of distant possessions desirable. If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that, ultimately, our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action."

Mr. Justice Gray, in filing an additional concurring opinion, agrees with Mr. Justice White and presents no new considerations of importance.

In comparing the opinions of Justices White and Brown, the main difference in the reasoning is to be found in the fact that Mr. Justice Brown does not regard any of the territories as part of the United States within the meaning of the Constitution, and therefore holds inapplicable those provisions which refer to a uniform rule "throughout the United States." Mr. Justice White on the other hand regards such provisions as applicable the moment newly acquired territory is incorporated into the Union by act of Congress, but holds that the treaty-making power cannot

effect such incorporation. Congressional action is necessary in order to make acquired territory a part of the United States within the meaning of the Constitution. In one sense therefore, Mr. Justice White places narrower limits to the power of Congress than Mr. Justice Brown, for according to the latter, Congress in dealing with the territories is not bound by the provisions of the Constitution which refer to the "*United States*," even after such territories have been incorporated into the Union by Congressional action. In the opinion of Mr. Justice White, on the other hand, all provisions of the Constitution which are in any way applicable to the territories acquire full force and effect therein, the moment such territory is incorporated into the United States by act of Congress.

The dissenting opinion in the *Downes* case is presented by The Chief Justice, Justices Harlan, Brewer and Peckham concurring. The opinion rests upon a strict interpretation of the provisions of the Constitution relating to the powers of Congress. To the minority, the case of *Loughborough vs. Blake* (5 Wheaton 317) is conclusive. Mr. Chief Justice Marshall's definition of the term "*United States*"¹ as used in the Constitution is accepted without reserve, and the view of the majority that such definition was *obiter* is unqualifiedly rejected.

The rule of interpretation being settled, there can be no doubt as to the limitations on the power of Congress. The attitude of the dissenting justices is well illustrated in their

¹ The power then to lay and collect duties, imposts and excises may be exercised, and must be exercised throughout the United States. Does this term designate the whole, or any portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of States and territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania; and it is not less necessary, on the principles of our Constitution, the uniformity in the imposition of imposts, duties and excises should be observed in the one, than in the other. Since, then, the power to lay and collect taxes, which includes direct taxes, is obviously co-extensive with the power to lay and collect duties, imposts and excises, and since the latter extends throughout the United States, it follows that the power to impose direct taxes also extends throughout the United States."—*Marshall, C. J., in Loughborough vs. Blake.*

approval of the doctrine, that the Constitution "neither changes with time nor does it in theory bend to the force of circumstances. It may be amended according to its own permission; but while it stands it is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. Its principles cannot, therefore, be set aside in order to meet the supposed necessities of great crises." The question is whether Congress having created a civil government for Porto Rico, having constituted its inhabitants a body politic, and having given it a governor and other officers, a legislative assembly, and courts, with right of appeal to this court, can in the same act and in the exercise of the power conferred by the first clause of section eight of the Constitution, impose duties on the commerce between Porto Rico and the States and other territories in contravention of the rule of uniformity qualifying the power. "If this can be done, it is because the power of Congress over commerce between the States and any of the territories is not restricted by the Constitution."

While concurring in the dissenting opinion of the Chief Justice, Mr. Justice Harlan in a separate opinion, offers reply to some of the doctrines laid down by the majority. The principle upon which he rests his view is that Congress has no existence and can exercise no authority outside of the Constitution. "This nation is under the control of a written Constitution, the supreme law of the land and the only source of the powers which our Government, or any branch or officer of it, may exert at any time or at any place. Monarchical and despotic governments, unrestrained by written constitutions, may do with newly acquired territories what this Government may not do consistently with our fundamental law. To say otherwise is to concede that Congress may, by action taken outside of the Constitution, engraft upon our republican institutions a colonial system such as exists under monarchical governments."

In answer to the suggestion of Mr. Justice White, that conditions may arise when, with the annexation of distant possessions we will have to deal with an alien race, unprepared for the administration of government according to Anglo-Saxon principles, Mr. Justice Harlan says: "Whether a particular race will or will not assimilate with our people, and whether they can or cannot with safety to our institutions be brought within the operation of the Constitution, is a matter to be thought of when it is proposed to acquire their territory by treaty. A mistake in the acquisition of territory, although such acquisition seemed at the time to be necessary, cannot be made the ground for violating the Constitution or refusing to give full effect to its provisions. The Constitution is not to be obeyed or disobeyed as the circumstances of a particular crisis in our history may suggest the one or the other course to be pursued."

Any attempt to discuss opinions of such far-reaching political importance from an exclusively legal standpoint, must necessarily meet with considerable difficulty. Their relation to our public policy is so intimate, that their true significance can only be appreciated when examined in the light of the constitutional development of the country. The opinions, themselves, fail to separate considerations of public policy from strictly legal principles. Not that this is surprising; it lies in the nature of the questions involved. In passing on an issue such as this, the court is brought face to face with the broadest of political questions,—namely,—the adaptation of an instrument of government to an entirely new set of problems.

The legal controversy waged before the Supreme Court in the Insular cases is but a chapter in that larger struggle, whose successive stages are marked by such questions, as,—the right to purchase Louisiana and Florida, the right to charter a United States bank, the right to enact a protective tariff, the right to govern the territories and the right to issue legal tender. Not only do the arguments in the cases involving

these questions, bear close resemblance to those used in the Insular cases, but the division of opinion in the court is traceable to the same divergence of view as to the nature of our constitutional system. That the final result of the century of constitutional controversy is expressed in wider national powers, and in an ever-increasing ability of the national government to cope with great and new questions of public policy is not without significance for the questions now under consideration.

Whenever the Supreme Court has been called upon to decide questions relating to the power of the executive and legislative departments of the government over territory belonging to the United States, but not situated within any of the States, the Court has, as a rule, decided in favor of the plenary powers of the political organs of the government. The desire not to hamper the political organs of the government in the choice of means, when confronted with great problems, has at times led the court to resort to the most advanced form of legal dialectics and even to legal fictions. It is true that, in the course of its opinions, the court has often indulged in expressions tending to give support to both parties in subsequent controversies, but the final judgment has, as a rule, broadened rather than limited the discretionary power of Congress and the President. The case of *Fleming vs. Page*, which the minority of the Court in the De Lima case attempts to qualify, but which is accepted unreservedly by the majority, and is invoked by four of the Justices in the Downes case, is one of the most striking illustrations of this attitude of the Court. The expressions of opinion as to the power of Congress over newly acquired territory in this and in subsequent cases clearly shows a settled purpose on the part of the Court to leave such status to be determined by the political organs of the government.

When the Court in *Mormon Church vs. United States* (136 U. S. 42) says,—“the territory of Louisiana when acquired from France, and the territories west of the Rocky Moun-

tains when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the government, in its diplomatic negotiations had seen fit to accept, relating to the rights of the people then inhabiting these territories " it is simply giving expression to a rule which was not, and could not, be embodied in the Constitution at the time of its adoption, because the circumstances which called forth the rule were absent. Fortunately, however, the provisions of the Constitution were framed in such general terms, and the absolute prohibitions upon the central government were so few, that when a new situation arose, it was possible to formulate the new rule without doing violence to any constitutional provision. The same attitude of the Court is illustrated in *National Bank vs. County of Yankton* (101 U. S. 129), in which the Court says,— "the territories are but political subdivisions of the outlying dominion of the United States." Even in the case of *Cross vs. Harrison*, so strongly relied upon by the majority of the Court in the De Lima case, the expressions bearing on the specific point at issue, viz., duties paid after the ratification of the treaty with Mexico and prior to the admission of California as a State, tend to show the desire of the Court to place California, prior to its admission, under the complete control of Congress.

As to the reasoning of the Court in the Insular cases, it is interesting to note how largely the element of "expediency" enters into all the opinions, but especially in the dissenting opinions in the De Lima and Dooley cases. In the latter, Mr. Justice White, after examining in detail the inconvenience which would result if instantly, on the ratification of a treaty, articles coming from a newly acquired territory should be entitled to free entry into the United States, says: "All these suggestions however, it is argued, but refer to expediency, and are entitled to no weight as against the theory that, under the Constitution, the tariff laws of the United States took effect of their own force immediately upon the

cession. But this is fallacious. For, if it be demonstrated that a particular result cannot be accomplished without destroying the revenue power conferred upon Congress by the Constitution, and without annihilating the conceded authority of the government in other respects, such demonstration shows the unsoundness of the argument which magnifies the results flowing from the exercise, by the treaty-making power, of its authority to acquire, to the detriment and destruction of that balanced and limited government which the Constitution called into being."

The majority in the *De Lima* case (The Chief Justice, Justices Brown, Harlan, Brewer and Peckham), and the minority in the *Downes* case (The Chief Justice, Justices Harlan, Brewer and Peckham) express themselves as strongly opposed to giving any weight to the element of expediency, and yet, a careful analysis of these opinions will show that while this class of considerations is not given the same prominence as in the opinion quoted above, the Court is unable to avoid the discussion of the influence of its conclusions on the powers of Congress and the President.

A comparison of the opinions in the *Insular* cases will show that in spite of the great divergence in conclusions, eight of the nine Justices are agreed as to at least one important principle of constitutional interpretation. This fact has been obscured by the undue prominence given to Mr. Justice Brown's opinion in the *Downes* case. Mr. Justice White (Justices Shiras, Gray and McKenna concurring) and The Chief Justice (Justices Harlan, Brewer and Peckham concurring) are agreed that Congress, in governing the territories, derives its authority and is subject to all the limitations of the Constitution applicable thereto. In other words eight of the nine Justices lay down the rule that Congress cannot withhold the Constitution from territory under its control after such territory has been incorporated into the United States. As Mr. Justice White tersely puts it:—"In the case of the territories as in every other

instance, when a provision of the Constitution is involved, the question which arises is not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable." This principle is of transcendent importance, as it sets at rest much of the uncertainty aroused by some of the earlier decisions of the Supreme Court of the United States.

The opinions of the four concurring and four dissenting Justices in the *Downes* case diverge in the interpretation of the effect of the treaty of cession and the establishment of civil government, upon the status of Porto Rico. In the opinion of the four dissenting Justices the ratification of the treaty made Porto Rico a part of the United States, and therefore no act of Congress or of the Executive, nor even their combined action could treat Porto Rico differently from other parts of the United States. It is interesting to note that the same view is presented by Mr. Justice Brown in the *De Lima* case. On the other hand, Justices White, Shiras, Gray and McKenna take the view in the *Downes* case, which is likewise consistent with their view in the *De Lima* case,—that a treaty of cession cannot make newly acquired territory a part of the United States in a domestic sense; that is, it cannot incorporate an alien people into the United States without the express or implied approval of Congress. They expressly repudiate the theory that the "Union of the United States" is a union of states only, and hold that the term "United States" within the meaning of the Constitution embraces the states and such territories as have been made part of the United States by the express or implied assent of Congress. The logical result of this rule is that Congress may insert in a treaty conditions against immediate incorporation. The view of Mr. Justice Brown is that the Union is a union of states alone, and that the territories do not form a part of the United States within the meaning of the Constitution. We therefore find three gradations of opinion as to the scope of the

term "United States" as used in the Constitution. The Chief Justice and Justices Harlan, Brewer and Peckham take the view that the moment new territory is acquired, no matter under what conditions or circumstances, such territory becomes a part of the United States, within the meaning of the Constitution and all constitutional guarantees and limitations immediately become applicable. On the other hand, Justices White, Shiras, Gray and McKenna hold that such newly acquired territory does not come within the constitutional provisions until the political organs of the government, namely,—Congress and the President, have given their express or implied assent to the incorporation of such territory into the United States. Finally, Mr. Justice Brown leans strongly to the opinion that the term "United States" as used in the Constitution refers to the union of states and does not include the territories.

Testing these three views by the strict canons of legal precedent, we find that they all have a basis in expressions of opinion by the court in earlier cases. This is largely due to the fact that the question of the applicability of the Constitution to newly acquired territory has never presented itself in such definite form. The precedents cited in the *Insular* cases should be examined in the light of the principle laid down by Mr. Justice Taney in the *Genesee Chief* case (12 Howard 443), when, in justifying a departure from a principle laid down in an earlier decision, he said "the great importance of the question as it now presents itself could not have been foreseen, and the subject therefore did not receive the elaborate consideration which at this time would have been given it."

The consciousness that a new situation confronts the country seems particularly evident in the opinion of Mr. Justice White in the *Downes* case. His views give evidence of a desire to formulate a principle at once simple and readily intelligible. Whether we agree or disagree with his conclusions, they furnish a clear and definite rule by which

the political organs of the government may guide their conduct in dealing with newly acquired territory. The principle of interpretation as laid down gives to them complete power over such territory until, by express legislative enactment or by acquiescence in a rule contained in a treaty of cession, such acquired territory is made a part of the United States. Until such action is taken by Congress, the territory remains subject to the jurisdiction of the United States, but does not become a part thereof, and the only limitations upon the power of Congress are those prohibitions of the Constitution which go to the very root of the power of Congress to act at all, irrespective of time or place; or, as Mr. Justice White says: "by those absolute withdrawals of power which the Constitution has made in favor of human liberty, and which are applicable to every condition or status."

Although this view receives the assent of but three of his associates, it seems likely from the reasoning of the dissenting Justices, that it will furnish the basis for the Philippine decision, unless some radical change be made in the make-up of the court. The great merit of the principle as thus laid down lies in the fact that it enables the political organs of the government to deal with the newly acquired territory in accordance with its requirements.

It is fortunate, both for the immediate needs of our public policy, as well as the future expansion of the country, that the doctrine of immediate, irrevocable, automatic incorporation through mere cession has been repudiated. If the views of the four dissenting Justices in the *Downes* case had prevailed, both Congress and the Executive would have found their hands tied in dealing with our new possessions in such a way as to make efficient government almost, if not quite, impossible. No instrument of government no matter how perfect, can long withstand such a strain. In all the crises of our national life, the Constitution has been found adequate to meet new situations as they presented themselves. In

spite of some uncertainty as to the view of the court on a number of important questions relating to the government of acquired territory, a rule of interpretation has now been formulated, sufficiently broad to enable Congress to deal with the immediate necessities of the situation. Any interpretation which falls short of this requirement must react injuriously upon the authority of the Constitution. To preserve its authority the principle pronounced by Mr. Justice Story in *Martin vs. Hunter's Lessee* (1 Wheaton 326) must ever be kept in mind. "The Constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications which at the present might seem salutary, might in the end prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers as its wisdom and the public interests should require."

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